

D. JESSE SMITH
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ATTORNEY FOR DEFENDANT JESUS LORETO

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,)	
)	NO. CR05-01406-001-TUC-FRZ
PLAINTIFF,)	
)	SENTENCING MEMORANDUM IN
VS.)	SUPPORT OF GROUND FOR
)	DEPARTURE IN DRAFT REPORT/
JESUS LORETO,)	OBJECTION TO GUIDELINES
)	
DEFENDANT,)	
_____)	

It is expected that excludable delay pursuant to 18 U.S.C. 3161 will occur as a result of this motion or an order based thereon.

COMES NOW the undersigned counsel for JESUS LORETO, and files the attached Memorandum of Points and Authorities in objection to the guideline calculations in the draft presentence report or in the alternative, in support of the ground for departure included in the report.

RESPECTFULLY SUBMITTED this 13th day of April, 2006.

s/_____
D. JESSE SMITH

MEMORANDUM OF POINTS AND AUTHORITIES

Paragraphs 64 and 65 of the draft Presentence Report reads:

64. The statute under which the defendant was convicted does not require proof that drugs be imported for distribution purposes. Nevertheless, this is typically the case for offenses prosecuted under 21 USC 952 and presumably the reason why the applicable guideline for any violation of the statute is 2D1.1, a guideline clearly intended to punish distribution offenses. Here, however, the defendant maintains he imported 102.9 grams of pure methamphetamine solely for his personal use. In support of his claim, the defendant maintains he was using 5 to 6 grams of methamphetamine daily at the time of the offense. The defendant's addiction is corroborated by his use of the substance while on pretrial release. Further, while even a 50 milligram dose can potentially trigger overdose and death, in rare cases chronic addicts evidently do inject up to 1 gram of methamphetamine every two to three hours (see www.addiction-help-line.com).
65. Considering this, were the Court to find that the defendant imported the methamphetamine for his personal use, departure under 5K2.0 may be warranted as this would be an extraordinary circumstance not taken into account under 2D1.1

Defendant Loreto was a heavy methamphetamine user who lives in Bisbee, Arizona, just a few miles from the border. In the instant case, Mr. Loreto was arrested crossing the border with 112 grams of meth and a glass pipe for smoking it. Meth is of better quality and cheaper in Mexico than on this side of the border.

Count I of the indictment, which charged possession with intent to distribute, was dropped. Mr. Loreto has been undergoing treatment for meth usage through Pretrial Services (Paragraph 3 PSR and attached letter from Ms. Webster of Southeastern Arizona Behavioral Services). Mr. Loreto has always maintained the meth was for his personal use.

In Paragraph 10 of the PSR, the base offense level for the offense is 32, based on the amount of drugs involved.

If Mr. Loreto had been arrested in Bisbee, this side of the border, the applicable guideline would clearly be calculated minus the amount for personal use. See U.S. v. Williams, 247 3d 353 (2nd Circ. 2001), U.S. v. Gill, 348 F.3d 147 (6th Circ. 2003), U.S. v. Kipp, 10 F3d 1463 (9th Circ. 1993).

Second, failure to distinguish the amount possessed for personal use from the amount possessed for distribution contravenes a fundamental principle of the Sentencing Guidelines - proportionality in sentencing - because it would result in sentencing a drug user who possessed 50 grams for personal use and gave one gram away more harshly than a drug dealer who possessed 49 grams for distribution.

10 F.3d at 1466.

This would be a level 12 offense, the minimum level for methamphetamine in the drug table. Concededly, the government does not have to prove that the defendant imported a drug for distribution in order to prove a violation of 21 USC 952; most drugs that are smuggled across the border are intended for distribution. This does not change the logic of the aforementioned cases as far as guideline calculations go, clearly someone who lives by the border is going to shop for his or her needs at the best quality and price, whether buying milk, gasoline or methamphetamine; the harm to a society etc. is not any greater than from someone possessing the same amount of meth in Missouri for personal use. (C.F. 2D1.1 B (4), which provides for a 2 (two) level enhancement for importing methamphetamine).

In the instant case, the base offense level is calculated at 32, which is 20 levels greater than the level 12 it should begin at, simply because Mr. Loreto lives in a border community. If the instant case were prosecuted in state court, it would be a mandatory probation case pursuant to A.R.S. 13-901.01, which provides for automatic probation and drug treatment for anyone

convicted of possession for personal use of any controlled substance.

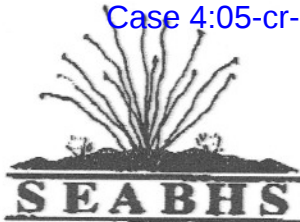
RESPECTFULLY SUBMITTED this 13th day of April, 2006.

/s/ _____
D. JESSE SMITH

Copy of the foregoing
delivered this date to:

Andrew Lopez
Federal Probation

Melinda Mendez
Assistant U.S. Attorney



SouthEastern Arizona Behavioral Health Services, Inc

Administration

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Inpatient and After Hours Crisis Services:

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Nurse 520/586-9501
Crisis 800/586-9161
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Outpatient, Crisis, Case Management, and Prevention Services:

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April 6, 2006

To Whom It May Concern,

I've had the pleasure of knowing Mr. Loreto since attending Substance Abuse class, Phase I at Seabhs in Bisbee.

Mr. Loreto started group Dec. 21, 2005, and attended on a regular basis. Due to family obligations, Mr. Loreto was unable to attend two classes, Jan. 23rd and 30th, both days he notified Seabhs regarding his absence. These are considered excused absences.

Mr. Loreto has been an active participant in group discussions and dynamics, offering support to his fellow peers.

Since knowing Mr. Loreto, he has made great strides in his progress; he has shown dedication to his recovery, not only with fulfilling his obligations to the courts but also his responsibility to his family.

Mr. Loreto is a compassionate individual who is keenly aware of the mistakes he has made.

It is my opinion that Mr. Loreto would best be served by extending his treatment here at Seabhs with the completion of Phase I, entering IOP, followed by After Care and individual counseling.

Please consider community service for his consequence.

Thank you for your consideration to this matter.

I am available any time if further assistance is required.

Yours,

Catherine Webster ACM I
Catherine Webster ACM I